

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE: OFFICE OF CONSUMER ADVOCATE, Petitioner, vs. LEGACY LONG DISTANCE INTERNATIONAL, INC., Respondent.	DOCKET NO. FCU-02-28 (C-02-405)
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ORDER DENYING MOTION FOR RECONSIDERATION

(Issued July 28, 2003)

On December 31, 2002, the Consumer Advocate Division of the Department of Justice (Consumer Advocate) filed with the Utilities Board (Board) a petition for a proceeding to impose civil penalties pursuant to Iowa Code § 476.103, asking that the Board review the proposed resolution in C-02-405, involving Legacy Long Distance International, Inc. (Legacy), and consider the possibility of assessing a civil penalty pursuant to Iowa Code § 476.103(4)"a." On June 18, 2003, the Board issued an order reviewing the record assembled in the informal complaint proceedings and denying the request to impose civil penalties against Legacy.

The record showed that the Board received a complaint from customer Fred Starling, alleging that Legacy caused collect call charges to be placed on his local

telephone bill without authorization. Board staff forwarded the complaint to Legacy and, on December 17, 2002, Billing Concepts, Inc. (Billing Concepts), responded to the complaint as the billing agent for Legacy. Billing Concepts stated that while the collect call in question was placed to Mr. Starling's home number, Mr. Starling's account was credited for the full amount of the charge (\$22.45).

On December 18, 2002, Board staff issued a proposed resolution describing these events and proposing that the credit offered by Billing Concepts and Legacy represented a fair resolution of the situation. The parties were allowed 14 days to appeal the proposed resolution. No party other than Consumer Advocate challenged the proposed resolution within the time period allowed.

The Board denied Consumer Advocate's request for the imposition of civil penalties against Legacy, finding that the incident at issue appeared to be the result of an isolated error that would not be deterred by civil penalties. The Board also found that Consumer Advocate had not provided any reasonable ground for further investigation of the matter.

On July 2, 2003, Consumer Advocate filed a motion for reconsideration and request for oral argument. In the motion, Consumer Advocate asserted six individual bases for reconsideration. Each issue raised by Consumer Advocate will be addressed below.

1. The petition did not address the proposed resolution.

Consumer Advocate asserts that the Board was in error when it stated in its June 18, 2003, order that Consumer Advocate's "request for proceeding to impose civil penalties fails to address the proposed resolution." Order, p. 3. Consumer Advocate supports this assertion by citing specifically to paragraphs 3 and 4 of its request for proceeding to impose civil penalties where the term "proposed resolution" was used in three individual occasions.

The Board acknowledges that Consumer Advocate mentioned the proposed resolution in its initial request. However, Consumer Advocate's petition failed to provide any specific, substantive reasons as to why the proposed resolution was incorrect or to provide reasonable grounds for further investigation. It was Consumer Advocate's failure to address these aspects of the proposed resolution which prompted the Board's statement in its June 18, 2003, order.

2. The petition did request a specific remedy.

Consumer Advocate states that the Board was in error when it stated in its June 18, 2003, order that "[t]he request for proceeding to impose civil penalties fails . . . to request, or even suggest, any specific remedy beyond what has already been done." Order, p. 3. Consumer Advocate asserts that the reason for its request was to suggest the specific remedy of a civil monetary penalty.

While it is undisputed that Consumer Advocate's intent in filing its request was to seek the remedy of civil penalties against Legacy, Consumer Advocate failed to

explain why the proposed decision was inappropriate and why civil penalties should be considered in this case. It was Consumer Advocate's failure to support its requested remedy with evidence from the record which prompted the Board's statement in its June 18, 2003, order.

3. Credits alone are an insufficient response to the problem.

Consumer Advocate asserts that crediting a customer's account for the cost of a slamming or cramming error is insufficient to curb the violations. Consumer Advocate supports this assertion by citing to a customer letter from a different case and suggesting that, "small credits of unlawful charges have not done the job in the past." "Motion for Reconsideration," p. 5.

Despite Consumer Advocate's argument that credits to a customer's account are insufficient to deter unauthorized changes in telephone service, data obtained by the Board's Customer Service Section indicates an approximate 50 percent decrease in slamming incidents since the start of 2003 when compared to prior-year data. It appears that this significant decrease in slamming incidents may be, at least in part, due to customer credits. Consumer Advocate's statement that credits "will not do the job in the future" ("Motion for Reconsideration," p. 5), fails to recognize this improvement in the number of slamming complaints received to date.

4. Proceedings for civil or monetary penalties need not and should not require formal state investigations.

Consumer Advocate asserts that formal proceedings are not necessary for the Board to impose civil penalties against violators of the unauthorized change of

service laws. In support of this assertion, Consumer Advocate states that the Board has broad authority to effect the purposes of the laws it administers. Iowa Code § 476.2(1). Consumer Advocate analogizes slamming and cramming violations with speeding or traffic violations, stating that minor administrative hearings could be scheduled “a couple of weeks after” a violation occurs to resolve the matters with reasonable promptness.

First, Consumer Advocate appears to ignore the Board’s established procedures regarding formal complaint proceedings outlined in 199 IAC 6, which apply to these complaints pursuant to 199 IAC 22.23(7). Upon the filing of a request for formal complaint proceedings or request for civil penalties following a proposed resolution, it is Board procedure to assign a formal complaint proceeding (FCU) number to the request. Consumer Advocate chose to file this petition for reconsideration under the informal complaint proceeding docket number, which is no longer applicable to this case. This failure to comply with established Board procedures presents a risk of improper filing of the request and, as a result, presents the possibility that the Board may inadvertently fail to rule on a motion if Consumer Advocate persists in misfiling its requests. Consumer Advocate is under the same obligations as other parties before the Board and needs to follow the same established procedures as are required of other parties.

Second, Consumer Advocate’s analogy between slamming and cramming violations and traffic offenses is inappropriate. Slamming and cramming violations do

not have an established schedule of fines, as do traffic offenses. To levy civil penalties under existing Board rules requires an exercise of judgment based on the evidence in the record. To fairly exercise this judgment as required by statute, a hearing must be held to allow the parties due process. This process becomes expensive and taxes the limited resources available to the Board. It is for this reason that Iowa Code § 476.3 and the Board's rules require a showing of reasonable grounds for further investigation in situations, such as the one at issue here, before conducting an administrative proceeding, including a hearing, to determine whether civil penalties are appropriate remedies. Consumer Advocate failed to provide such a showing.

If the Board had unlimited resources, this scenario might be different, but that is unrealistic and irrelevant. The Board has limited resources and, therefore, must strive to use them efficiently. Docketing every single slamming or cramming complaint for hearing, or even for a "notice and opportunity of hearing," is not an efficient use of those limited resources.

5. Proceedings for civil monetary penalty need not and should not require proof of multiple violations.

Consumer Advocate asserts that the Board's statement that "cramming cases, like this one, appear to be the result of isolated errors that will not be deterred by civil penalties" ("Order," p. 2), suggests an enforcement policy that requires proof of multiple violations prior to the issuance of a civil monetary penalty and that such a policy is largely ineffectual. In support of this assertion, Consumer Advocate states

that many violations are not reported and, of those that are reported, some result in an incorrect determination that the violation is not a slam or cram. Also in support of this assertion, Consumer Advocate again analogizes traffic violations to slamming and cramming violations.

The Board does not suggest that multiple violations are required for civil penalties to be imposed as the result of a slamming or cramming violation. Nevertheless, a pattern of such violations against consumers is certainly a factor which the Board will consider when determining whether to proceed with formal complaint proceedings or whether to assess civil penalties and how much of a penalty should be assessed. Moreover, the independent investigation of individual slamming or cramming violations, as suggested by Consumer Advocate, is not an efficient use of limited Board resources in the absence of some reason to believe further investigation will be fruitful. Consumer Advocate also appears to argue that the Board should assume that a company that is accused of a slam or a cram has other unreported or undetected violations. The Board cannot make this assumption.

Consumer Advocate again analogizes slamming and cramming violations to traffic offenses by claiming that giving a speeding ticket to a driver who is guilty of speeding only once is reasonable because “the driver is not treated unjustly, because the driver in fact is guilty, and the penalty is not great.” “Motion,” p. 9, emphasis added. The fundamental flaw with Consumer Advocate’s analogy is that the Board cannot be certain that a company “in fact is guilty” without pursuing a formal

investigative proceeding, including opportunity for a hearing, before determining whether civil penalties are appropriate. Consumer Advocate appears to be asking the Board to assume a fact that must be proven. As previously mentioned, a showing of reasonable grounds for further investigation is required before incurring the expense of a formal investigation and hearing regarding the imposition of civil penalties. The single occurrence of an alleged slam or cram, by itself, does not meet that burden.

6. Consumer Advocate is a proper petitioner.

At page 10 of its Motion, Consumer Advocate asserts that the Board's "Order" states at page 2, that "[n]o party other than Consumer Advocate has challenged the staff's proposed resolution," the Board implies that "[t]he customer's failure to challenge the proposed resolution indicates that the customer is satisfied with the resolution and does not wish to pursue this matter further." "Motion," pp. 10-11. Consumer Advocate concludes that the Board is suggesting that Consumer Advocate is not a proper petitioner in this case.

The June 18, 2003, "Order" contains no language addressing the question of whether Consumer Advocate is a proper petitioner, and the Board did not state in this docket that Consumer Advocate is not a proper petitioner. In other dockets, the Board has indicated that a customer's decision not to challenge the proposed resolution is an indication to the Board that the customer does not wish to pursue the matter any further. This is a reasonable inference from the customer's silence.

Consumer Advocate now states in its motion to reconsider that the customer is willing to testify at a hearing, if necessary. This new information is not a basis for reconsideration. This information should have been asserted in Consumer Advocate's initial petition.

Finally, as a point of clarification, Consumer Advocate is a proper petitioner in this matter, but it must allege a case it can reasonably be expected to prove.

IT IS THEREFORE ORDERED:

The "Motion for Reconsideration and Request for Oral Argument" filed by the Office of Consumer Advocate Division of the Department of Justice on July 2, 2003, is denied as described in the body of this order.

UTILITIES BOARD

/s/ Mark O. Lambert

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

/s/ Elliott Smith

Dated at Des Moines, Iowa, this 28th day of July, 2003.